

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PETER M. BLOOM AND PRISCILLA M. TOUMEY	:	SMALL CLAIMS DETERMINATION DTA NO. 820646
for Redetermination of a Deficiency or for Refund of New	:	
York State Personal Income Tax under Article 22 of the	:	
Tax Law and New York City Personal Income Tax	:	
pursuant to the Administrative Code of the City of New	:	
York for the Years 1999 and 2000.	:	

Petitioners, Peter M. Bloom and Priscilla M. Toumey, P.O. Box 2321, Westport, Connecticut 06880, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax pursuant to the Administrative Code of the City of New York for the years 1999 and 2000.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 90 South Ridge Street, Rye Brook, New York, on April 20, 2006 at 9:15 A.M. Petitioner Peter M. Bloom appeared *pro se* and also for his spouse Priscilla M. Toumey. The Division of Taxation appeared by Mark F. Volk, Esq. (Wladyslaw Szymura).

The final brief in this matter was due by July 21, 2006, and it is this date that commences the three-month period for the issuance of this determination.

ISSUE

Whether the Division of Taxation properly denied petitioners' request for a conciliation conference on the basis that the request was not timely filed.

FINDINGS OF FACT

1. On January 21, 2005, the Division of Taxation ("Division") issued a Notice of Deficiency ("notice") to petitioners asserting that they owed \$7,468.12 of additional New York State and City personal income taxes for the years 1999 and 2000. The notice was addressed to petitioners and sent by certified mail to their last known address at "P.O. Box 2321, Westport, CT 06880-0321." The United States Postal Service left two notices with petitioners that they had a piece of certified mail; however, petitioners never accepted delivery of the notice and therefore it was returned to the Division as "unclaimed." Enclosed with the notice was a letter, also dated January 21, 2005, wherein the Division indicated that "[O]ur records indicate that a Power of Attorney is on file for tax matters at issue in the enclosed document. Therefore, a copy of the document has been forwarded to your legal representative. . . ."

2. On or about June 7, 2005, petitioners sent a letter to the Division wherein they contested the amounts asserted due in the notice. The letter was deemed to be a Request for Conciliation Conference and was therefore forwarded to the Division's Bureau of Conciliation and Mediation Services ("BCMS").

3. On July 1, 2005, BCMS issued a Conciliation Order Dismissing Request to petitioners wherein their request for a conciliation conference was denied for the following reason: "[T]he Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice was issued on January 21, 2005, but the request was not mailed until

June 8, 2005, or in excess of 90 days, the request is late filed. The request filed for a Conciliation Conference is denied.”

4. Petitioners timely protested the Conciliation Order Dismissing Request by filing a petition with the Division of Tax Appeals and this proceeding ensued. Since the Division has raised the issue regarding the timeliness of petitioners’ Request for Conciliation Conference, the scope of the small claims hearing held herein was limited to this threshold jurisdictional issue. In instances such as this where the timeliness of the Request for Conciliation Conference is in dispute, the Division has the burden of proving proper mailing of the notice.

5. To establish the date that the notice was mailed, that it has a standard procedure for the issuance of notices of deficiency and that the standard procedure was followed in this case, the Division offered in evidence its certified mailing records, a copy of the notice and three affidavits of employees having knowledge of the facts of this case or familiar with the creation, processing and mailing of notices of deficiency. The above evidence, taken together, sufficiently establishes that the Division has a standard procedure for issuance of notices of deficiency and that said procedures were followed with respect to the notice issued to petitioners. The Division did not submit any evidence to establish that it properly mailed a copy of the notice to petitioners’ duly authorized representative.

CONCLUSIONS OF LAW

A. As applicable to this proceeding, Tax Law §§ 689(b) and 170(3-a) and 20 NYCRR 4000.3(c) provide that when a Notice of Deficiency is issued to a taxpayer, such taxpayer has 90 days from the date of the Notice of Deficiency to file a Request for Conciliation Conference. Where a taxpayer files a Request for Conciliation Conference and the timeliness of said request

is in question, the Division has the burden of proving that the notice was properly mailed (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). In the instant matter, the Division has presented sufficient evidence to prove that the notice was properly mailed to petitioners at their last known address on January 21, 2005 (Tax Law § 681[a]). The statute does not require actual receipt by the taxpayer. Where the Division establishes that the Notice of Deficiency has been properly issued, that is sent by certified or registered mail to the taxpayer's last known address, the notice is valid and sufficient whether or not actually received. (*See, Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990; *Matter of Kenning v. State Tax Commn.*, 72 Misc 2d 929, 339 NYS2d 793, *affd* 43 AD2d 815, 350 NYS2d 1017, *appeal dismissed* 34 NY2d 667, 355 NYS2d 1028.)

B. Although I have concluded that the Division has established that it properly mailed the notice to petitioners on January 21, 2005, my analysis does not end there. While the Tax Law does not specifically provide for service of the notice on a taxpayer's representative, the Tax Appeals Tribunal has consistently held that the 90-day period for filing a petition or request for a conciliation conference is tolled if the taxpayer's representative is not served with the notice (*see, Matter of Nicholson*, Tax Appeals Tribunal, June 12, 2003; *Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000; *Matter of Brager*, Tax Appeals Tribunal, May 23, 1996; *Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988, *citing Matter of Bianca v. Frank*, 43 NY2d 168, 401 NYS2d 29). Here, the Division raised the issue of timeliness yet failed to adduce any evidence to establish the date of mailing or actual receipt of the notice by

petitioners' representative. Accordingly, the time period for filing a Request for Conciliation Conference is tolled and the request is deemed timely.

C. It is concluded that the Division of Tax Appeals has proper jurisdiction in this matter, and the petition of Peter M. Bloom and Priscilla M. Toumey for a hearing on the merits is accepted. A small claims hearing on the merits will be scheduled by the Division of Tax Appeals in due course.

DATED: Troy, New York
October 12, 2006

/s/ James Hoefer
PRESIDING OFFICER